No. 84-220

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

Donald L. Dunlap,

Petitioner,

vs.

State of Washington,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of Washington

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Question Presented.

Whether a defendant's claim before the Supreme Court of Washington that he would not have been convicted but for the ineffective assistance of counsel, filed prior to and pending at the time of this court's decision in Strickland vs. Washington, No 82-1554, should now be reviewed under the rules of law set forth in that decision.

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Petitioner Donald L. Dunlap respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals, Division III, of the State of Washington, entered March 29, 1984, and the order of the Supreme

Court of the State of Washington, denying review of said judgment and opinion, which order was entered on June 8, 1984.

Opinion Below.

The unpublished opinion of the Washington Court of Appeals, Division III, appears in the Appendix to this petition. (Appendix A) The order of the Washington Supreme Court denying review appears in the Appendix. (Appendix B)

Jurisdiction.

The judgment of the Court of Appeals of the State of Washington, Division III, was entered on March 29, 1984. Petition for Review to the Supreme Court of the State of Washington was timely filed on April 30, 1984, and denied by Order entered on June 8, 1984. This petition was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

Constitutional Provisions Involved.

Amendment VI to the United States Constitution provides that

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Statement of the Case.

Petitioner was charged with Second Degree Theft involving the break-in of two different automobiles and the taking of items of value from them. The Information framed the two charges in a single count, the two charges being joined with the conjunction "and." Counsel was appointed to represent petitioner, who was a high school boy, eighteen years of age at the time.

Petitioner had no criminal history. He maintained his innocence before his counsel. Nevertheless, counsel's investigation was limited to meeting with petitioner and his mother and father and telephoning one or two unidentified- (counsel's notes did not show who they were and counsel could not remember) persons. In addition, counsel, with the prosecuting police officer, visited the place where petitioner was apprehended. This was done more than one month after the incident and counsel's appointment.

Counsel conceived his defense of petitioner on the basis of the information as framed. Since there was no evidence connecting petitioner to the break-in of the one car, counsel defended on the basis that the State could not prove its information as charged. When, after the close of the State's case, the

court permitted the information to be amended to strike that part for which no evidence existed, the defendant was convicted of the remaining charge. Counsel's defense was then limited to putting on two of the young boys who had testified for the prosecution and a third boy who had not testified. He said that he did not have the petitioner testify because petitioner's account was at variance with the two boys who testified for the prosecution and because he felt that petitioner was nervous. Counsel did not have petitioner's parents testify even though their evidence was exculpatory. He believed that their testimony was not material.

Petitioner was convicted of Second Degree Theft. He obtained new counsel who moved for a new trial on the basis of ineffective assistance of counsel. This

motion was denied, without findings- (which are not required by Washington Court Rules), by Order dated Dec. 4, 1981. Appendix C. At the hearing on motion for new trial, trial counsel's statement was by affidavit. Petitioner appealed his conviction and the denial of his motion for new trial.

While his appeal was pending, petitioner was acquitted of charges of malicious mischief and vehicle prowling related to the car involved in petitioner's Second Degree Theft conviction. And one of the juvenile witnesses was convicted of false swearing involving his testimony at petitioner's trial for second degree theft.

With his acquittals of malicious mischief and vehicle prowling, and the conviction of the juvenile witness for false swearing, petitioner moved again

for vacation of his conviction and new trial based on these new circumstances. His motion was initially granted, orally, by the judge; then denied and a written order denying petitioner's motion to vacate was entered. The denial of his motion to vacate was likewise appealed.

Petitioner appealed on the basis of ineffective trial counsel. The Court of Appeals of the State of Washington, Division III, affirmed the trial court, finding "... counsel was effective." In his Petition for Review to the Washington Supreme Court (this appears in the Appendix as Appendix D), petitioner asked the Washington Supreme Court to adopt the Federal Objective Standard of measurement of counsel's performance; that is, petitioner claimed that reasonably competent attorneys of the criminal bar would not have done so little investi-

gation and based petitioner's defense on a poorly framed information; he claimed that he would not have been convicted but for his counsel's ineffectiveness. Appendix D, pgs. A-37,38.His petition was prepared April 26, 1984, and timely filed on April 30, 1984. Two weeks later, on May 14, 1984, the United States Supreme Court decided Strickland vs. Washington, No. 82-1554. A synopsis of Strickland was published in Volume 6, No. 15, page 59, of the Supreme Court Bulletin and was received by petitioner's counsel on June 8, 1984. That same day, the Washington Supreme Court denied petitioner's Petition for Review. Washington Court Rules do not permit a Motion for Reconsideration of that court's denial of a Petition for Review.

REASONS FOR GRANTING THE WRIT

When a defendant who maintains his

innocence is defended by counsel who fails to investigate his case, counsel does not have a basis for not investigating. When that counsel chooses instead to defend his client on the basis that the information charges defendant in a single count with theft of items from cars A and B, and there is only evidence regarding car B, he chooses a defense which no reasonably effective attorney would elect. The amendment of an Information is a common and expected part of every criminal proceeding.

In presaging this court's opinion in Strickland vs. Washington, ___U.S.___, 104 S.Ct. 2052 (1984), petitioner claimed that trial counsel's defense did not meet the professional standard of effectiveness and that he was convicted because of counsel's ineffectiveness. The Washington Court of Appeals, reviewing

under a standard of "effective representation," found only that counsel was "effective." (Appendix, A-3, A-4) In his Petition for Review to the Supreme Court of Washington, submitted prior to this court's decision in Strickland, supra, petitioner realleged his claim of ineffectiveness of counsel and asked that court to adopt the federal objective standard of Beasley vs. United States, 491 F.2d 687, 696 (6th Cir. 1974). This is the same standard that this court, in Strickland, supra, declared to be the appropriate standard of review for claims of ineffectiveness of counsel.

Without opinion, the Washington Supreme Court denied the petition. The standard of review can not be determined from that court's order. The Washington Supreme Court has not previously adopted the objective standard of review for claims

of ineffective assistance of counsel. State vs. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967); State vs. Adams, 91 Wn.-2d 86, 586 P.2 1168 (1978); State vs. Ermert, 94 Wn.2d 839, 621 P.2d 121- (1980). The Washington Courts of Appeals have sometimes employed such standards, State vs. Henderson, 26 Wn.App. 187, 611 P.2d 1365 (1980); State vs. Cobb, 22 Wn.App. 221, 589 P.2d 297 (1978); sometimes not, State vs. Dunlap (unreported; see Appendix A).

As the final arbiter of what the United States Constitution means, this court has construed the Sixth Amendment to require reasonably effective assistance of counsel, using an objective standard of review. 104 S.Ct., at 2064-2065; Appendix D, at page A-37. Every defendant has a constitutional right to have his case judged by that standard. In

his appeal to the Washington Court of Appeals and his Petition for Review to the Washington Supreme Court,(Appendix D, A- 37 to A- 38) petitioner set forth specific acts of counsel which he claimed did not meet an objective standard of reasonably effective assistance of counsel; and he claimed that, but for counsel's ineffectiveness, he would not have been convicted; 104 S.Ct. 2066 and 2068; Appendix D at A- 38 . It cannot be determined from the judgment and opinion of the Court of Appeals of Washington and the order of the Washington Supreme Court that his claim was reviewed under the standard set forth in Strickland, supra. The petitioner asks this court to issue a Writ of Certiorari to the Washington Supreme Court to afford him his constitutional right under the Sixth Amendment.

CONCLUSION.

For the reasons set forth above, a Writ of Certiorari should issue to review the judgment and opinion of the Washington Court of Appeals, Division III, in this matter and the order of the Washington Supreme Court, denying petitioner's Petition for Review to that court.

Respectfully submitted,

Aaron Horowitz,
Attorney for Petitioner

APPENDIX A

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

STATE oF WASHINGTON,
Respondent,

v.

DONALD LOUIS DUNLAP,
Appellant.

No. 5593-III-1
No. 4905-III-1

Division Three
Panel Two

FILED March 29, 1984

THOMPSON, J.--Donald Dunlap appeals his conviction for second degree theft and the denial of his motion to vacate.

Sergeant Cleavenger and Officer Thompson, two off-duty Richland police officers, noticed four boys, Nix, Hogan, Templeton, and Dunlap, acting suspiciously. The officers were curious and circled the area in a white Trans Am automobile. As they approached the boys,

Sergeant Cleavenger saw Dunlap drop what later proved to be a CB radio. The officers made contact with Dunlap and his companions, located the radio, and sent for a police car to transport the young men to the police station. Before the car arrived, Dunlap fled, but after a lengthy chase, was caught by Cleavenger. According to Cleavenger, during the chase Dunlap threw his shirt at the sergeant. When the shirt was retrieved, Cleavenger noticed it had small drops of blood on it, which he presumed had come from numerous cuts on Dunlap's hands. The shirt was returned to Dunlap at the station.

Hogan, Nix and Templeton wrote statements indicating that Dunlap had broken into a car near a baseball field and stolen $4, then broken into another car by the Kadlec Hospital in Richland and stolen a CB radio. All three boys

testified that Sergeant Cleavenger told them what to write. Neither the radio nor CB were dusted for fingerprints during the investigation.

Dunlap was convicted of second degree theft. He obtained new counsel and appealed. The State moved to strike Dunlap's first brief, contending he went outside the record. That motion was held in abeyance, allowing Dunlap to present a motion to vacate under CR 60(b). That motion was denied and Dunlap appeals that ruling as well as his conviction.

First, Dunlap argues he was denied effective assistance of counsel. The test on review of claims of ineffective assistance of counsel is whether after considering the entire record it can be said the accused was afforded effective representation and a fair and impartial trial. State v. Ermert, 94 Wn.2d 839, 621

P.2d 121 (1980). If it is determined defendant was denied effective representation, then it must be determined whether the denial was prejudicial. State v. Serr, 35 Wn.App. 5, 664 P.2d 1301 (1983); State v. Johnson, 29 Wn.App. 807, 631 P.2d 413 (1981).

After review of the entire record, we find counsel was effective. His cross examination brought out inconsistencies in witness testimony. His defense was mistaken identity and failure to prove the case beyond a reasonable doubt.

Dunlap argues he should have been allowed to testify. Whether to call a particular witness to testify is usually considered trial tactics and will not be second guessed. State v. Peyton, 29 Wn.App. 701, 630 P.2d 1362 (1981); State v. King, 24 Wn.App. 495, 601 P.2d 982 (1979). However, a criminal defendant

has an absolute right to testify and that right cannot be waived by his attorney. State v. King, supra. Here, there is no indication Dunlap was prevented from-taking the stand. Rather, he argues failure to put him on the stand was a poor tactical choice. We do not review tactical choices. State v. Ermert, supra; State v. Johnson, supra.

Dunlap also argues his attorney failed to conduct an adequate investigation. This contention is buttressed by lengthy argument and suggestions of how counsel might have interviewed witnesses and developed evidence. However, results on review cannot be controlled by whether new appellate counsel, with the benefit of hindsight and speculation, can come up with an alternate theory of defense. Dunlap speculates that exculpatory evidence might exist or that he might have

been a good witness. In substance, he argues that in a new trial a different approach might bring different results. A review of the record reveals adequate trial preparation and investigation. We conclude Dunlap was afforded effective assistance of counsel.

Dunlap next argues the court erred by allowing the State to amend the information at the close of its case.

The original information provided:

> in violation of RCW 9A.56.020(1) 9A.56.020(1)(a) and RCW 9A.56.040-(1)(a) did wrongfully obtain property, to-wit: a CB radio, AM/FM radio and U.S. currency of a value in excess of $250.00 belonging to Jon Manthos and Barbara Ray of such property [sic].

After the State rested, it was allowed to reopen its case and delete the words "and U.S. currency" and "and Barbara Ray". The U.S. currency in question was less than $5.

CrR 2.1(d) allows an information to be amended at any time before a verdict or findings if substantial rights are not prejudiced. See State v. Brown, 74 Wn.2d 799, 447 P.2d 82 (1968). Dunlap's claim the State's amendment prejudiced him is without merit. The amendment did not change the crime charged. To prove second degree theft, the State had to prove theft of money or property in excess of $250; it did not have to prove theft of the CB, radio, and cash unless the cash was necessary to reach the dollar element. The evidence established the value of the CB and radio was well in excess of $250. The $4 in U.S. currency was unnecessary to prove the State's case. Thus, the amendment did not prejudice the defendant.

The third issue presented is whether Dunlap was entitled to a dismissal be-

cause the State failed to take fingerprints from the CB and radio, thus failing to preserve material evidence.

The rule concerning preservation of evidence does not require the State investigators to search for exculpatory evidence. State v. Judge, 100 Wn.2d. 706, ____ P.2d ____ (1984). See also State v. Mounsey, 31 Wn.App. 511, 653 P.2d 892 (1982); State v. Jones, 26 Wn.App. 551, 614 P.2d 190 (1980); State v. Hall, 22 Wn.App. 862, 593 P.2d 554 (1979).

Dunlap also complains of the State's failure to preserve as evidence the shirt he was wearing at the time of trial. The defendant did not raise this issue at trial, nor did he properly assign error on appeal. Furthermore, since the shirt was returned to Dunlap, its unavailability is the fault of the defendant.

The fourth issue is whether the

trial court erred in denying defendant's motion for a new trial. Dunlap moved for a new trial pursuant to CrR 7.6(a)(6) and (8).[2] He alleged error in allowing the amendment and lack of substantial justice because of (1) recanted testimony, (2) ineffective counsel, and (3) failure to preserve evidence. A motion for new trial rests with the discretion of the trial court. State v. Bartholomew, 98 Wn.2d-173, 211, 654 P.2d 1170, cert. denied, 103 S. Ct. 3548 (1982). Ineffective counsel and failure to preserve evidence have already been addressed and rejected. The trial court did not abuse its discretion in finding these same grounds inadequate to justify a new trial.

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[2] "(a) Grounds for New Trial . . .

" . . .

"(6) Error of law occurring at the trial and excepted to at the time by the defendant;

" . . .

"(8) That substantial justice has not been done."

During trial, Templeton testified Dunlap had handed him a radio on the night of the incident. Templeton has since recanted this testimony and presented an affidavit in which he said Dunlap gave him something the shape and weight of a piece of a two-by-four about 8 inches long. He said his testimony Dunlap gave him a radio was not true.

Generally:

> Recantation by an important witness of his or her testimony at trial does not necessarily, or as a matter of law, entitle the defendant to a new trial. The determination of such matters rests in the sound discretion of the trial court, and its action will not be set aside except for clear and manifest abuse.

State v. Wynn, 178 Wash. 287, 288, 34 P.2d 900 (1934); see also State v. Shaffer, 72 Wn.2d 630, 434 P.2d 591 (1967); State v. Snyder, 199 Wash. 298, 91 P.2d 570 (1939); State v. Lee, 13 Wn.App. 900, 538 P.2d 538 (1975). The trial judge,

having had all the witnesses before him, is in a better position to determine whether the retraction "shook the very foundation upon which the conviction rested". Wynn, at 290. We find the court did not abuse its discretion denying the motion for a new trial on this basis.

Dunlap also argues the court should have held a hearing on the issue and cites State v. Rolax, 84 Wn.2d 836, 529 P.2d 1078 (1974), overruled in part, Wright v. Morris, 85 Wn.2d 899, 540 P.2d 893 (1975). But, these cases arose under former CrR 7.7, (82 Wn.2d 1165 (1973), rescinded July 1, 1976) which provided for postconviction relief with the appellate, not superior court. Dunlap's argument was rejected in State v. Snyder, supra. There, the court held knowledge acquired during trial was sufficient to form a basis for ruling on the motion for

a new trial. It was not necessary for the trial court to hold a separate hearing on this motion for a new trial.

The final issue is whether the court erred in denying defendant's motion to vacate the judgment pursuant to CR 60(b).

After his superior court conviction, Dunlap was charged in municipal court with four offenses arising out of the evening's activities. Templeton, the recanting witness, was charged with perjury. Dunlap was acquitted of malicious mischief and vehicle prowling. Templeton was convicted of false swearing. The record of these proceedings was not properly part of the record on appeal. Therefore, Dunlap moved to vacate, apparently based on CR 60(b)(3):

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceedings for the following reasons:

> ...
> (3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);

See also RAP 16.4(c)(3); CR 59(a)(4); CR 60(b)(3); CrR 7.6. Five requirements must be met before a new trial is granted based on newly discovered evidence.

> (1) the evidence must be such that the results will probably change if a new trial were granted; (2) the evidence must have been discovered since the trial; (3) the evidence could not have been discovered before the trial by exercising due diligence; (4) the evidence must be material and admissible; and (5) the evidence cannot be merely cumulative or impeaching.

State v. Davis, 25 Wn.App. 134, 138, 605 P.2d 359 (1980). The ruling on such motions is discretionary with the trial court. State v. Davis, supra.

First, new evidence was presented of Dunlap's acquittal in district court of malicious mischief and vehicle prowling. In and of itself the acquittal has no bearing on this case. An acquittal on

other charges arising from the same evening's events does not prove innocence in the instant case. It is a factor that can be considered in ruling on a motion for a new trial, but it is not controlling. We do not find that the fact of acquittal would probably change the result in a new trial.

Second, evidence was presented of Templeton's conviction of false swearing. RCW 9A.72.040.[3] As indicated in his memorandum opinion, the judge struggled with this issue. In denying the motion, he believed the problem was a play on words because the item was referred to as a CB, scanner, radio, and something the size of a two-by-four, 8 inches long. Templeton

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[3] RCW 9A.72.040:

"(1) A person is quilty of false swearing if he makes a false statement, which he knows to be false, under an oath required or authorized by law."

never denied an item was given to him; only that it was a radio. Yet, there were two items in question. Thus, the trial court found the affidavit recanting the testimony was of "doubtful and insignificant value". The trial court's analysis is reasonable. There was no abuse of discretion.

Furthermore, even if the trial-judge's reasoning had not been accepted, perjury alone is not reason to vacate the judgment. Doss v. Schuller, 47 Wn.2d 520, 288 P.2d 475 (1955); Pack v. Nielsen, 4 Wn.App. 362, 481 P.2d 465 (1971). Ignoring the testimoney of the recanting witness, there was adequate evidence presented of the defendant's guilt.

The judgment of the trial court is affirmed.

A majority of the panel having determined this opinion will not be printed

in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Thompson, J.

WE CONCUR:

Munson, J

Green, J

APPENDIX B
The Supreme Court of Washington

Order on June 8, 1984,
Petition for Review Calendar.

The court having considered the following Petitions for Review on its June 8, 1984, Petition for Review Calendar; now therefore it is hereby ordered:

a. The following Petitions for Review are denied:

....

Division III

...

State v. Donald Louis Dunlap,

Court of Appeals No. 4905-1-III,

Supreme Court No. 50535-7

...

Dated at Olympia, Washington, this 8th day of June, 1984.

William H. Williams
Chief Justice

APPENDIX C

IN THE SUPERIOR COURT

OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF BENTON

STATE OF WASHINGTON
Plaintiff,

vs.

DONALD LOUIS DUNLAP,
Defendant.

Case No. 81-1-00215-7

ORDER DENYING MOTION FOR NEW TRIAL

THIS COURT, having received the motions of the defendant, Donald Louis Dunlap, for new trial and for arrest of judgment; having extended the time for filing of the motion for new trial and having received defendant's motion for new trial, filed October 16, 1981, with supporting statements and affidavits;

having received the state's memorandum in opposition to motion for new trial and having received defendant's reply tc

state's memorandum in opposition to motion for new trial and having subsequently received the affidavit of Michael L. Larsen, trial counsel, and the affidavits of Glenn H. Dunlap and Faye Dunlap; now therefore it is

ORDERED that defendant's motion for new trial is denied.

DONE IN OPEN COURT this 4th day of the month of Dec., 1981.

Richard B. Patrick
JUDGE OF SUPERIOR COURT

Presented by:

Aaron Horowitz
Aaron Horowitz
Attorney for Defendant,
Donald L. Dunlap

Approved and Notice of
Presentation Waived:

Ray R. Whitlow
Ray Whitlow,
Deputy Prosecuting Attorney

APPENDIX D

No. 4905-III-1

No. 5593-III-1

SUPREME COURT

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

DONALD LOUIS DUNLAP, APPELLANT

PETITION FOR REVIEW

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I N D E X

[1] Page numbers correspond with original Petition for Review.

TABLE OF AUTHORITIES

[2]Page numbers correspond with original Petition for Review.

A. IDENTITY OF PETITIONER

Donald I. Dunlap asks this court to accept review of the Court of Appeals' decision terminating review designated in Part B. of this petition.

B. COURT OF APPEALS DECISION

A copy of the decision of the Court of Appeals is in the Appendix at pages A-1 through A-8. The decision was filed on March 29, 1984.

C. ISSUES PRESENTED FOR REVIEW

1. Is the defendant denied effective assistance of counsel when his appointed trial counsel conceives his trial strategy as a technical defense based on a poorly framed Information; and the defendant is convicted when the court permits the state to amend its Information to conform to its proof?

2. When the defendant does not take the stand at his trial, does the trial

court have the duty to determine whether or not the defendant has made a knowing and voluntary waiver of his right to testify, including the right to override his counsel's decision to the contrary; and should the trial court's determination be made a matter of record?

3. Does the defendant have a right to a new trial when he shows the court that (1) a main prosecution witness is later convicted by the prosecuting attorney of false swearing in the matter to which the witness testified in defendant's Superior Court trial and (2) defendant is later acquitted in the Richland District Court of vehicle prowling and malicious mischief, matters which dealt with the same incident which formed the sole basis of the element of "wrongful taking" in defendant's conviction for second degree theft?

D. STATEMENT OF THE CASE

Off-duty officers apprehend four-boys at night.

Four high school boys, Nix, Hogan, Templeton, and Dunlap met at a bowling alley on a warm evening in June, 1981, and went for a walk which took them through the parking lot behind Kadlec Hospital in Richland. (No. 4905, RP 6667, 76-77; SCP 27) It was night. For a short time, Dunlap was separated from the-others; but he caught up with them at a vacant lot next to the hospital area. (No. 4905, RP 69-71, 85; SCP 28) Two off-duty Richland police officers, in casual dress and driving a white Firebird Trans-Am automobile, noticed the boys and-thought that they acted suspiciously. (No. 4905, RP 3,4,40,140) The officers were curious and circled the area. (No. 4905, RP 9,10) As they drove up to the

vacant lot in which the boys were, one of the officers, Sergeant Cleavenger, from 90 feet away, claimed to identify the defendant in the middle of the lot. (No. 4905, RP 31) He testified that the defendant dropped something. (No. 4905, RP 10,11) The other officer, Officer Thompson, in the same car with Cleavenger, did not identify the defendant as being in the middle of the lot but as crossing the street toward the lot at the time that the officers drove up. (No. 4905, RP 41)

The officers made contact with the four boys. They located a CB radio in the lot and sent for a police car to transport the boys to the police station. (No. 4905, RP 12,42) Before the car arrived, Dunlap fled, but after a lengthy chase was caught by Cleavenger. (No. 4905, RP 14) According to Cleavenger, during the chase, Dunlap threw his shirt at him.

(No. 4905, RP 17,18) At trial, Cleavenger testified that the shirt had small drops of blood on it and that he had observed cuts on the defendant's hands. (No. 4905, RP 17,18)

Hogan, Nix, and Templeton wrote-statements indicating that Dunlap had broken into a car near a baseball field and stolen four dollars, and then broken into another car by the Kadlec Hospital in Richland and stolen a CB radio. (No. 4905, Ex 17,18,20) All three boys testified that Sergeant Cleavenger had dictated to them what to write. (No. 4905, RP 72,129) Later the same evening, a second radio was found at the place in the lot where Templeton had been. (No. 4905, RP 44) Templeton's explanation at trial was that the second radio had been given to him by the defendant. (No. 4905, RP 79, 80)

The car that was broken into in the Kadlec Hospital parking lot was not identified by the defendant, but by one of the other boys, Hogan. (No. 4905, RP 71-72)

Counsel is appointed for Dunlap and defends the charge.

The defendant was charged with second degree theft and given appointed counsel. Defendant told his counsel that he was innocent and knew nothing about the two radios found by the police. (No. 4905, SCP 26-29, SCP 6) Counsel for the defendant met with the defendant and his parents. He met no other witnesses until the trial. He had talked with one or two of the other boys by telephone. (No. 4905, SCP 26-27, SCP 6)

The information (No. 4905, CP 25-26) was in a single count, charging the defendant with breaking into two cars,

one at the baseball field and one at Kadlec Hospital. No evidence connected the defendant with the breakin of the car at the baseball field. Defense counsel believed that the state could not prove its case with the counts combined. His concept of the defense was the inability of the prosecution to prove its case as charged. (No. 4905, RP 100, SCP 29, SCP 6) Neither the defendant nor his parents, who had received defendant's shirt the morning following the incident, testified. Defendant's parents were prepared to testify that there was no blood or glass on their son's shirt. Defense counsel thought that their testimony was not material. (No. 4905, SCP 29, SCP 6) The defendant had no criminal history whatsoever. His statement to his counsel is of record and it explains his part in the events. (No. 4905, SCP 27-29, 44-45, SCP

6) Counsel for defendant claimed that he did not have the defendant testify because the defendant's testimony would conflict with that of the other three boys and he felt that the defendant was nervous. (No. 4905, SCP 29, SCP 6) The jury never heard the defendant's account. The jury never heard his parents.

Although defense counsel explained to the judge that he had conceived his defense based on the information as-charged, the trial judge permitted the state's amendment of the Information and allowed the state to strike the charge regarding the car at the baseball field. (No. 4905, RP 100110) Defendant was convicted of second degree theft of radios from the breakin of the Kadlec Hospital parking lot car.

Defendant acquitted of District-Court charges; Templeton convicted of-false swearing in Juvenile Court.

The defendant still faced charges of malicious mischief and vehicle prowling in the Richland District Court. These charges were based on the breakin of the car at the Kadlec Hospital. The defendant obtained different counsel and was acquitted of both charges in the Richland District Court. (No. 5593, CP 45) Later, Templeton was convicted of false swearing based on the conflict between his testimony at the defendant's superior court trial and his affidavit in support of defendant's motion for new trial. (No. 5593, CP 53,54) Templeton had also testified in defendant's behalf at the Richland District Court trial. (No. 5593, CP 46) Based on Templeton's conviction for false swearing and defendant's acquittals

for vehicle prowling and malicious mischief in the Richland District Court, defendant moved the trial court to vacate his conviction. At hearing, the trial court orally granted the defendant a new trial (No. 5593, RP of September 10, 1982, at page 32); but, after reviewing Templeton's testimony in the different district court and juvenile court proceedings, the court determined that Templeton should not have been convicted, that his conviction came about owing to a "play on words," and denied the defendant's motion to vacate his conviction. (No. 5593, CP 20-30)

Defendant appealed his conviction and the denial of his motions for new trial and to vacate his conviction. The appeal was denied by opinion of the Court of Appeals, Division III, on March 29, 1984. Defendant then presents this pe-

tition for review.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. The court of appeals decision applies the subjective standard to review of ineffective assistance of counsel in conflict with decisions of the same court and of Division II which have applied the objective standard.

In State vs. Adams, 91 Wn.2d 86, 586 P.2d 1168 (1978), this court addressed effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution. The defendant, Adams, had been convicted of robbery while armed with a deadly weapon. He appealed on the sole issue of the effectiveness of his trial counsel and asked this court to adopt an objective standard, a standard different from the subjective standard announced by this court in State vs. Thomas, 71 Wn.2d 470,

471, 429 P.2d 231 (1967). The Thomas standard is stated:

> After considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?

The objective standard as sought by the defendant was the standard announced in Beasley vs. United States, 491 F.2d 687, 696 (6th Cir. 1974):

> We hold that the assistance of counsel required under the Sixth Amendment is counsel reasonably likely to render and rendering reasonably effective assistance. It is a violation of the standard for defense counsel to deprive a criminal defendant of a substantial defense by his own ineffectiveness or incompetence.- [citing cases] Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interest, undeflected by conflicting considerations. [citing- cases]

This court then went on to state, in Adams, Supra as follows:

> Even with this [objective] standard, however, trial tactics cannot serve as a basis for a claim of inadequate representation, unless these tactics would be considered incompetent by lawyers of ordinary training and skill in the criminal law.

Since Adams, the effectiveness of the assistance of trial counsel has often been an issue for appellate review. It nas only infrequently resulted in reversal. State vs. Ermert, 94 Wn.2d 839, 621 P.2d 121 (1980); State vs. Jury, 19 Wn.App. 256, 576 P.2d 1302 (1978).

Although the objective standard was not adopted by the Adams court, appellate decisions have since incorporated such a standard. In State vs. Henderson, 26 Wn.App. 187, 611 P.2d 1365 (1980), the Division III court stated:

> Without an affirmative showing of inconsistencies of such a magnitude as to deprive a defendant of his constitutionally guaranteed right to a fair trial, ... a defendant is bound by his counsel's trial tactics. ... The test is whether lawyers of ordinary training would consider the tactics incompetent ...

In State vs. Cobb, 22 Wn.App. 221, 589 P.2d 297 (1978) the Court of Appeals, Division II, said:

Defendant has a weighty burden of proving: First, that in view of the entire record he was denied effective representation; and second, that he was prejudiced thereby. State vs. Jury,- supra. As Jury further explains, counsel is not expected to perform flawlessly or with the highest degree of skill. It is only when his performance is such that no reasonably competent attorney would have so conducted himself, that a client has grounds for complaint and the court duty to grant relief.

It is submitted that, under an objective standard, the defendant was in this case denied effective assistance of counsel. It is submitted that no attorney with ordinary training and skill in the criminal law would have relied on a poorly drafted information which,- unamended, accused the defendant of a crime of which he could be (ultimately was) convicted and a crime of which the state had no evidence whatsoever. The amendment of an information is a common and considered part of every criminal proceeding. Counsel's trial tactics would

be regarded as incompetent by lawyers of ordinary training and skill in the criminal law. By the single stroke of permitting the State to amend its information, the trial court effectively did away with the defense as conceived by trial counsel. Don Dunlap was convicted because of the ineffective way in which his counsel conceived his defense.

In its decision, the Court of Appeals states that the defense was "mistaken identity and failure to prove the case beyond a reasonable doubt." The record will show that defense counsel did not prepare to defend on the merits of his client's case but relied on a technical defense based on the Information as drafted.

Defense counsel stated:

I just think that the State charged in the manner that they did and that's how we always approached our preparation

of our defense; and, therefore, any-amendment, I feel, of itself is a matter of prejudice to the defendant, and it is our position that the state should be held to what they charged. (No. 4905, RP 100)

In defendant's first motion for new trial, the statement is made:

[that defense counsel] " ... conceived Don's defense mainly on the basis of the Information as charged. That is, he relied on Mrs. Dunlap's statement that the boys had told her that they had no knowledge whatsoever that Don had done the things in their statements which, in fact, had been dictated by the officer. [Defense counsel] felt, basically, that the State could not prove its case as charged ..."

and trial counsel admitted that this was so. (No. 4905, RP 84; SCP 29, SCP 6)

The Court of Appeals found no prejudice in the trial court's permitting the amendment of the information. In its opinion, at Page 4, the Court of Appeals held that "The evidence established the value of the CB and radio was well in excess of $250.00. The $4.00 in U.S.

currency was unnecessary to prove the State's case. Thus the amendment did not prejudice the defendant." But this was not the prejudice claimed by the defendant. The prejudice claimed by the defendant was that his counsel conceived his defense in the prosecution's being unable to prove one of the two crimes alleged in the single count of its unamended Information. Under ordinary circumstances,- with reasonably competent counsel, the amendment of the information would not have affected the trial. But as defendant's trial counsel conceived his defense, the amendment of the information was very prejudical to the defendant.

There is a conflict in the decision of this court in Adams, supra, and the courts of appeals in Henderson, Cobb, and Jury, supra. The standard applied in

this case is in conflict with the standard applied by Division III in Henderson. This court should resolve this conflict and set out in clear terms the appropriate standard for representation of criminal defendants in this state.

2. This court should require an independent inquiry into the defendant's constitutional right to testify. The Supreme Court should review this issue under RAP 13.4(b) because it is a valuable right and it has not been addressed up to now except by the courts of appeals. Other states and federal courts have found such a requirement. This court should adopt a similar policy for this state.

The defendant has a constitutionally protected right to testify on his own behalf. State vs. King, 24 Wn.App. 495, 601 P.2d 982 (1979) In deciding as to a

waiver of this right, the defense counsel must be governed by the will of the defendant. Winters vs. Cook, 489 F.2d 174 (5th Cir. 1973). A waiver is "an intentional relinquishment or abandonment of a known right or privilege." Johnson vs. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1937). Whether a proper-waiver exists is to be determined by the trial court, and the basis of that-determination should appear on the record. Johnson vs. Zerbst, supra; People vs. Curtis, 657 P.2d 990 (Col.App. 1982).

In this case, defense counsel did not have the defendant testify because he felt that the defendant's testimony would only contradict in part the statements of the other boys who had already testified; and he thought that the defendant was nervous. Even though the defendant had always protested his innocence to defense

counsel and had no record whatsoever, the court of appeals held these reasons to be tactics of defense counsel. There is no tactic in having a defendant who has always maintained his innocence and has an explanation of events remain silent while others accuse him of crime. His testimony should conflict with theirs. There is no tactic in having a defendant remain silent because trial counsel believes that he is nervous. Defense counsel's actions reflect his reliance on the Information as drafted and deprive the defendant of his right to testify on his own behalf. There is nothing in the record which indicates that the defendant was advised of his right to testify, including his right to override his counsel's advice if contrary, or that his waiver of that right was knowing and voluntary.

The United States Supreme Court-said:

"While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record." Johnson vs. Zerbst, supra, at page 465 of U.S. Reports.

The Colorado Court of Appeals has required an inquiry by the trial court as to whether defendant's waiver of his right to testify is knowing and voluntary and required also that it be of record. People v. Curits, supra. This court-should adopt a similar policy for this state.

3. Templeton's conviction for false swearing leaves the court not knowing whether his testimony convicting the defendant was false or his sworn statement in contradiction to that testimony was false. Defendant's acquittals of vehicle prowling and malicious mischief are a

conclusive determination that he did not break into the car at the Kadlec Hospital parking lot and that he did not take two radios from that car.

A motion to vacate judgment is addressed to the sound discretion of the trial court; yet, when the defendant shows that the main prosecution witness has been himself convicted of false-swearing and that he, the defendant, has been subsequently acquitted of the crimes for which evidence was presented by the prosecution to show the "wrongful taking" element of the crime of second degree theft of which he had been convicted, it is submitted that the trial court abuses its discretion in denying defendant's motion to vacate his conviction and order a new trial. The Court of Appeals, in its opinion, stated that " ... the judge struggled with this issue [of Templeton's

conviction for false swearing] ..." This is contrary to State vs. Williams, 96 Wn.2d 215, 634 P.2d 868 (1981). Williams states that the trial court does not have license to weigh the evidence and substitute its judgment for that of the jury. By analogy, it is submitted that the trial court in this case does not have the right to weigh Templeton's conviction for false swearing and to determine whether or not there should have been a conviction by the juvenile court. The trial court must accept the conviction of Templeton as a "given." Finally, it is submitted that the statement by the Court of Appeals that the defendant's acquittal would probably not change the result in a new trial is clearly wrong. The evidence of wrongful taking was the evidence of malicious mischief and vehicle prowling of both of

which the defendant was acquitted. As stated in Appellant's Reply Brief, at Page 16, without the testimony of Kevin Templeton and with the defendant's acquittals the state's case would not be sufficient to get to a jury.

This court should grant the defendant a new trial.

F. CONCLUSION

Defendant seeks reversal of his conviction and a new trial.

April 26, 1984

Respectfully submitted,

Signature

Aaron Horowitz
Attorney for Petitioner